



NATIONAL AUTOMOBILE DEALERS ASSOCIATION
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Legal & Regulatory Group

March 28, 2005

Via E-Mail

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Petition for Declaratory Ruling
Rules and Regulations Implementing the TCPA, CG Docket No. 02-278

Dear Secretary Dortch:

On behalf of the National Automobile Dealers Association (NADA), I am writing to request that the Federal Communications Commission (FCC or Commission) clarify that its National Do-Not-Call (DNC) rules do not prohibit an automobile or truck dealership from calling consumers at phone numbers registered on the National DNC Registry for the purpose of: (i) informing consumers that their vehicles are subject to recalls due to a safety, emissions or other defect or problem, and (ii) scheduling appointments with consumers at the dealership's service facility to correct the noted problem. Clarifying this issue will help advance the important public policy objective of increasing consumer awareness of, and response to, recalls involving products sold by franchised automobile and truck dealers.

NADA represents approximately 20,000 franchised automobile and truck dealers who sell new and used vehicles and engage in service, repair and parts sales. They employ more than 1.3 million people nationwide. A significant number of our members are small businesses as defined by the Small Business Administration.

Presently, the FCC's National DNC rules do not specifically address whether the term *telephone solicitation* includes telephone calls initiated by dealerships to consumers at phone numbers registered on the National DNC Registry for the purpose mentioned above. We believe such calls do not fit within the definition of *telephone solicitation* since consumers are neither requested nor required to "purchase" the services necessary to repair defects or

problems addressed by a recall.¹ Rather, the manufacturer of the noted item assumes financial responsibility for its repair. We further believe this interpretation is consistent with the intent of Congress, as evidenced by its express exclusion of e-mail messages that provide “product recall information” from the definition of “commercial electronic mail message” in the CAN-SPAM Act of 2003.² The FTC recently recognized the non-commercial nature of product recall information, when it stated:

CAN-SPAM’s definition of ‘transactional or relationship message’ includes specific categories of messages that Congress determined to be ones that consumers want to receive. These categories include vital information such as bank account statements, *product recalls*, transaction confirmations, and warranty information.³ (Emphasis added)

Although such messages are expressly excluded from the definition of a commercial e-mail message, the FCC has not formally addressed the issue of product recalls in the telemarketing context. Because of this ambiguity and the significant civil liability and administrative penalties that may result from violations of the National DNC rules, many dealers presently refrain from calling consumers about recalls unless they can confirm that the call fits within one of the exemptions to the National DNC rules.

The unfortunate effect this has on the marketplace is to significantly reduce telephone notifications to consumers about vehicle or equipment recalls, thus undermining the efforts of vehicle manufacturers, parts manufacturers, the National Highway Traffic Safety Administration and the Environmental Protection Agency to maximize the effectiveness of such recalls.

To avoid this unintended consequence, we request that the Commission clarify that a telephone call to a consumer for the purpose mentioned above is not a telephone

¹ The FCC defines *telephone solicitation* as “the initiation of a telephone call or message for the purpose of encouraging the *purchase* or rental of, or investment in, property, goods or services, which is transmitted to any person....” (emphasis added). 47 C.F.R. § 64.1200(f)(9)(2004).

² Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, 15 U.S.C. §§ 7701-7713 (2004). Section 3(2)(B) of the Act states that the term “‘commercial electronic mail message’ does not include a transactional or relationship message.” Section 3(17) includes within the definition of “transactional or relationship” message an e-mail message whose primary purpose is “(ii) to provide warranty information, *product recall information*, or safety or security information with respect to a commercial product or service used or purchased by the recipient” (emphasis added).

³ Definitions and Implementation Under the CAN-SPAM Act; Final Rule, 70 Fed. Reg. 3110, 3117 (Jan. 19, 2005).

solicitation that subjects the caller to the restrictions imposed by the National DNC rules.

Thank you for your consideration of this petition.

Sincerely,

Paul D. Metrey
Director, Regulatory Affairs

Cc: Honorable Jacqueline Glassman
National Highway Traffic Safety Administration

Honorable Margo T. Oge
Environmental Protection Agency